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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 60

MIKE MARVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA
AND CLYDE I. PLUMMER, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF FOR PETITIONER.

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BRIEF FOR THE PETITIONER.

Opinions Below.

There is no opinion of the Supreme Court of the State of California. The opinion of the California District Court of Appeals affirming the conviction in the criminal case is reported in 44 California Appeals 2nd, 858.

Jurisdiction.

The judgment sought to be reviewed was entered on March 22, 1943 (R. 30). Certiorari was granted by this

Court on June 7, 1943 pursuant to Section 237 b of the Judicial Code.

Question Presented.

Whether the Supreme Court of California erred in summarily refusing without a hearing the writ of habeas corpus, wherein petition alleged that petitioner was convicted after the prosecution knowingly had used perjured evidence against him.

Statement of Facts.

Petitioner was convicted by a jury in a California state court on consolidated informations charging him with the crime of robbery, the first offense taking place on March 31, 1940, and the second on June 30, 1940.

Petitioner was sentenced as a second offender to the California State prison at Folsom. On appeal the judgment was affirmed by the District Court of Appeals, State of California (*People* v. *Marvich*, 44 Cal. App. (2d) 858).

The petition for habeas corpus is excellently drawn and is supported by strong exhibits. However, it is deemed desirable to set forth the statement of facts as appearing in the opinion affirming petitioner's conviction, so that the significance of certain aspects of the exhibits may appear.

> "The two victims, Slocum and White, were partners in the distribution of the Los Angeles Examiner in the City of Long Beach, their place of business being at 338 East Third Street. At about 6:25 p. m. on March 31, 1940, appellant entered the place of business of Slocum and White, *dressed in a sailor's uniform.* (Emphasis supplied.) At the point of a revolver he compelled Slocum to open the safe and empty the money into a small suit case which appellant placed on the floor. The amount taken by the appellant was $2,357.00. At about 1:30 p. m. on June 30, 1940, appellant and Gibbons went to the same establishment and found present Virgil E. White and

several other persons. At the point of a revolver they were ordered to get back to the counter and lie down on the floor. The robbers compelled one of the victims to open the safe and dump money from it into a bag. The sum of $983.00 was taken at this time." (*People* v. *Marvich,* 44 Cal. App. (2d) 858.)

On March 22, 1943, petitioner, a layman acting in his own behalf, filed an original application for a writ of habeas corpus in the Supreme Court of California. Petitioner charges that his imprisonment is a result of deprivation of rights guaranteed him by the Constitution of the United States and the Constitution of California in that the California prosecuting authorities obtained his conviction by the presentation of testimony known by the prosecution to be perjured. The petitioner alleges that on August 1, 1940 (R. 1 and 2) he pleaded not guilty on arraignment to two separate informations charging him with the commission as a second offender of two separate felonies, and that upon the perjured testimony of an ex-convict, Eddie Black, the State's main witness, petitioner was held for trial in the Superior Court of the State of California in and for the County of Los Angeles (R. 2). Petitioner further alleges the district attorney for the above County and State on August 15, 1940, filed two separate informations against petitioner based upon the perjured testimony of Eddie Black (R. 2).

Exhibit A of the petitioner (R. 7-12 inclusive) is a portion of the direct examination of Eddie Black. The significant feature of this testimony is that Black testified that at no time did he see the petitioner on March 31, the date of the first felony, but merely heard his voice about 11:00 that night. The witness was in bed at the time and told of hearing the voice of Marvich in an adjoining room. He said that he saw Marvich the day after the felony in the bedroom of Meyer Kroll. There was a suit case containing

paper and silver money lying open on Kroll's bed. In the course of a conversation with Kroll and Marvich, Kroll said that he had "just got that from the Los Angeles Examiner in Long Beach."

The first trial of the petitioner on both informations resulted in a hung jury. The petitioner alleges (R. 2) that the State's witness, Eddie Black, testified in substance as he had at the preliminary hearing. Shortly after cross-examination started a recess was called and after said recess Eddie Black upon redirect examination testified he had been giving perjured testimony at the preliminary hearing and upon the first direct examination and now wished to tell the truth, and thereupon told a different story. The petition does not specify in what respects the story told by Black at that time was different.

Petitioner again was placed on trial with James W. Gibbons on November 18, 1940. Kroll apparently was not tried, at least at that time. Gibbons was charged with taking part in the second robbery. At this trial Black testified (R. 12-16 inclusive) that he had seen Marvich and Kroll in San Diego on the morning of the day the first felony was committed. He said he had seen them first in San Diego and that thereafter the three went to Long Beach and thereafter to Los Angeles, arriving in Los Angeles about 1:00 p. m. (Tr. 14) and remaining for two or three hours; that they returned to Long Beach about four or five o'clock in the afternoon, where the others left him at the vicinity of a roller skating rink for approximately one and one-half or two hours (R. 15).

At that time, Black testified, Marvich was wearing civilian clothes (R. 16), but on their return to pick him up near the skating rink, *Marvich was taking off a sailor's uniform.* (Emphasis supplied.)

At this second trial, in a colloquy taking place at the bench during the cross examination of Black, petitioner's

attorney stated it was clearly apparent from the testimony of Black that he had committed perjury at the previous trial (Tr. 17). The following occurred: The Court: "I don't think there is any question about that. I don't think there is now any doubt about the fact that he probably committed perjury at this trial."

The petitioner's attorney: "That is probably true too."

The Court: "I think we can all agree on that."

Petitioner's attorney: "I presume we all agree on that * * *."

The record would appear to indicate that the prosecutor remained silent as to that phase of the discussion.

The prosecutor in his argument to the jury (R. 19-20) said he "theoretically at least" vouched for the character of Eddie Black. He urged the jury to pay attention to Eddie Black's testimony. His contention was that despite Black's base character, the jury should accept and adopt his testimony if persuaded he was telling the truth.

Exhibits E and F of the petition (R. 20-23 inclusive) are affidavits made by petitioner and his co-defendant Gibbons. These affidavits recite that, following imposition of sentence on the day of their conviction, the prosecutor, Harry Keeler, appeared at the detention room of the courthouse and asked them to write him a letter stating their views of the crime so that he could give petitioner and his co-defendant a good recommendation to the prison board of directors. Petitioner asked the prosecutor why he wished to offer help "after the way he secured the conviction". The prosecutor stated "he did not like the way he had to secure the convictions and that he and Gibbons should have accepted his offer to plead guilty to a lesser offense, for the State's witness, Eddie Black, would testify any way the prosecution wanted him to as he is a two term offender and the prosecutor could send him to prison for life as an habitual criminal; the prosecutor then stated if he had not

made Eddie Black change his testimony affiant and Gibbons would no doubt have won the case * * *."

Affiant refused the prosecutor's offer and told him that he was innocent and that the prosecutor knew it, to which the prosecutor replied "he did not know whether affiant was guilty or not; that it was the prosecutor's duty to get a conviction."

The memorandum of points and authorities filed in support of this petition (R. 25) indicates that petitioner's defense at the trial was that he was not in the county when the robbery took place.

The petition for habeas corpus was filed in the Supreme Court of the State of California on March 15, 1943 (R. 1); the order denying the writ was entered by that Court on March 22, 1943. This Court on June 7, 1943, granted a motion for leave to proceed in forma pauperis and entered its order allowing certiorari. On June 14, counsel for the petitioner was appointed by this Court.

Specification of Errors.

The Supreme Court of California erred:

1. In peremptorily refusing the issuance of the writ of habeas corpus sought in a petition wherein petitioner alleged denial of due process and equal protection of the laws under the rights guaranteed him by the Constitution of the United States and the State of California.

2. The Supreme Court of California erred in failing to take testimony with respect to the verity of the allegations set forth in the petition.

Summary of Argument.

The petitioner charges that his conviction was brought about by the use knowingly by the prosecution of perjured testimony.

The duty of the Court in the circumstances required the issuance of the writ and the taking of testimony touching on the averments of the petition.

The peremptory refusal of the writ was error.

Argument.

The denial of the writ of habeas corpus by the Supreme Court of California was tantamount to the Court sustaining a demurrer to allegations of undoubted gravity with respect to the denial of petitioner's right to due process and equal protection of the laws under the 14th Amendment to the Constitution of the United States. The action of the Court is also violative of the provisions of Article 1, Section 13, of the Constitution of California, and of Sections 681 and 1484 of the Penal Code of California. The Supreme Court of California erred, it is respectfully submitted, in failing to determine the verity of the charges contained in the petition.

Article 1, Section 13, of the Constitution of California is as follows:

> "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of his life, liberty, or property without due process of law * * *."

Section 681 of the Penal Code of the State of California provides:

> "No person can be punished for a public offense except upon a legal conviction in a court having competent jurisdiction thereof."

Section 1484 of the Penal Code of California reads as follows:

> "The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention or in favor of the same and to dispose of such petition as the justice of the case may require, and to have full power and authority to require and compel the attendance of witnesses by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case."

The petition and supporting exhibits charge, first, that perjured testimony was used; second, that this fact was known to the prosecutor; and third, that the prosecutor after the trial conceded these allegations. While it is true that the prosecution in the course of the colloquy at the bench did not join the trial judge and petitioner's counsel in their views as to Black's perjury, the fact nevertheless remains that he stood silent while these observations were being made. The record discloses no effort on the part of the prosecutor to come to the defense of his witness.

The present proceeding has not as its object the matter of ascertaining truth or falsity of these allegations of the petition. That was the duty of the California court. It has as its object a review of the action of the Supreme Court of California in peremptorily refusing a writ of habeas corpus without taking proof touching on these grave accusations. The picture presented by the petition and exhibits is not pretty. It charges that a state's witness, an ex-convict, shifted his testimony to a degree that suggested the probability of perjury to the mind of the trial judge. The shift was such as to have shocked the conscience. Black testified at the preliminary hearing and for a time during the first trial of the case that he had not seen petitioner the day of the robbery (R. 7-12 inclusive). Indeed, his testimony at

the preliminary hearing included an admission of Kroll that he, Kroll, was the man executing the robbery (R. 11). The facts as found in the appellate court opinion, reviewing the conviction, would indicate that the robbery was perpetrated by a single individual.

When Black shifted his testimony, he said he had been in company with petitioner and Kroll virtually all the day of the felony. He added the damning fact, insofar as petitioner is concerned, that petitioner was removing a sailor's uniform on his return to the skating rink to pick up the witness. That the scales between the prosecution and defense had been closely balanced may be assumed from the fact that at the first trial of this case the jury was unable to agree.

Next, petitioner's allegations as to the prosecutor's admission that he had been compelled to have Black change his testimony are supported by the affidavit of the co-defendant Gibson. These charges required intensive inquiry as to their verity or falsity.

The action of the California Supreme Court in refusing the writ is in the teeth of *Mooney* v. *Holohan*, 294 U. S. 103, pages 112, 113, and of *Pyle* v. *Kansas*, 317 U. S. 213-15-16, and *Walker* v. *Johnson*, 312 U. S. 275, pages 286, 7. In deciding the *Mooney* case, a landmark of the law, this Court said:

> "• • • That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. Hebert *v.* Louisiana, 272 U. S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be per-

jured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers' * * *:"

The *Pyle* case bears a singular analogy to the instant case. In that case this Court held:

"Habeas corpus is a remedy available in the courts of Kansas to persons imprisoned in violation of rights guaranteed by the Constitution of the United States. Cochran *v.* Kansas, 316 U. S. 255, 258, 86 L. Ed. 1453, 1455, 62 S. Ct. 1068. Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney *v.* Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A. L. R. 406. They are supported by exhibits referred to above, and nowhere are they refuted or denied. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used and that favorable evidence was suppressed with the knowledge of the Kansas authorities. No determination of the verity of these allegations appears to have been made. The case is therefore remanded for further proceedings * * *."

Walker v. *Johnson* does not at first appear to be precisely in point because it treats of the procedure in habeas

corpus in Federal courts. However, when there is considered Section 1484 of the Penal Code of California, hereinbefore quoted, it will be perceived that *Walker* v. *Johnson* has strong application.

It is respectfully submitted that in view of Section 1484 of the California Penal Code, the procedure specified in *Walker* v. *Johnson* should have been followed. In that opinion this Court said:

> "Without repeating the allegations of the petition and traverse, which have been summarized above, we think it clear that, taken together, they overcome the presumption of regularity which the record of the trial imports and that, if the facts alleged were established by testimony to the satisfaction of the judge, they would support a conclusion that the petitioner desired the aid of counsel, and so informed the District Attorney, was ignorant of his right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right. On a hearing, he would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination ore tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable

and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion."

The position taken by the State of California, as reflected in the brief filed in Court in opposition to the petition for certiorari, appears to be that *Mooney* v. *Holohan* and subsequent similar cases have no application unless all the testimony is perjured. Counsel for petitioner respectfully submits that such a contention on the part of the State of California is straining the plain meaning of the *Mooney* case and placing upon it a restricted, awkward construction. The test resides in the fact of whether perjured testimony knowingly was used by the prosecution. The quantum thereof is not controlling.

Conclusion.

It is submitted that the instant cause should be remanded to the Supreme Court of California with instructions to proceed in conformity with the opinions of this Court, as expressed in *Mooney* v. *Hollohan, Pyle* v. *Kansas,* and *Walker* v. *Johnson, supra.*

Respectfully,

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